No. _____ (1)

Supreme Court, U.S.
F I L E D

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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was just and practicable for the United States Court of Appeals for the Ninth Circuit to retroactively apply amended Bankruptcy Rule 7004(f) to the underlying adversary proceeding to find personal jurisdiction over the Petitioners, non-residents who would not otherwise be subject to personal jurisdiction, when the amendments took effect after the applicable statutes of limitations for the underlying claims for relief had run, nearly two years after the Petitioners' motion to dismiss, nearly three years after the commencement of the adversary proceeding and over five years after the purported jurisdictional events took place?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran who were defendants-appellants in the Court of Appeals.

Respondents are Bernard Goodson, Ford Elsaessar, Lowell Finley and Jay J. Miller who were plaintiffs-appellees in the Court of Appeals. Respondents are the trustees of a litigation trust formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, the reorganized debtors.

Inoco Plc, a United Kingdom corporation now known as Inoco Limited, was also a party (defendant-appellant) to the Ninth Circuit appeal. Inoco Limited's parent company is Lawgra, Plc; it has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Petitioners") respectfully request that this Court issue a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed

November 3, 1997 and amended January 14, 1998 in this matter.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 133 F.3d 1141 (9th Cir. 1998), and is reproduced in the Appendix at A 1a-14a.[1] The opinion of the United States District Court for the District of Idaho is not reported, and is reproduced at A 34a-57a. The opinion of the United States Bankruptcy Court for the District of Idaho is not reported, and is reproduced at A 79a-168a.

STATEMENT OF JURISDICTION

The opinion and order of the Court of Appeals was filed on November 3, 1997 and, after rehearing, amended on January 14, 1998 (A 1a-14a). The jurisdiction of this Court to review the opinion and order of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Court of Appeals' erroneous retroactive application of amended Bankruptcy Rule 7004 to the underlying adversary proceeding. The former Bankruptcy Rule 7004, in effect through November 30, 1996, is set forth at A 169a-173a. The revised Bankruptcy Rule 7004 is set forth at A 174a-178a.

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[1] References preceded by "A" refer to pages in the Appendix accompanying this Petition.

STATEMENT OF THE CASE

A. Introduction

Petitioners are foreign residents and citizens with almost no contact with the State of Idaho. Nevertheless, they have been sued in the United States Bankruptcy Court for the District of Idaho in connection with alleged wrongs which, again, were not committed in Idaho. Ever since the commencement of the adversary proceeding against them and others in 1994, Petitioners have been contesting jurisdiction. No doubt recognizing that both the Bankruptcy Court and the District Court erred in finding that sufficient facts had been stated by Respondents to withstand a motion to dismiss for lack of personal jurisdiction based on Idaho's long-arm statute, the United States Court of Appeals for the Ninth Circuit did not address this basis for the lower courts' findings. Instead, the Ninth Circuit retroactively applied a new amendment to Bankruptcy Rule 7004, which confers jurisdiction over non-resident defendants so long as the exercise of jurisdiction is consistent with the Constitution. Rule 7004(f) provides:

> (f) *Personal Jurisdiction*. If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f) (A 177a-178a). Accordingly, the Ninth Circuit held that, if properly served personal jurisdiction can be asserted over such defendants by any bankruptcy court, so long as they had contacts with the United States. Thus, the Ninth Circuit has effectively created jurisdiction over the Petitioners where none previously existed, long after the predicate

acts conferring jurisdiction occurred, and long after the applicable statutes of limitations for the various claims for relief alleged against Petitioners have expired, thereby significantly impacting upon the Petitioners' rights, liabilities and remedies.

Under the circumstances, the Ninth Circuit should be reversed and the Amended Complaint dismissed against Petitioners. At the very least, the matter ought to be remanded for a hearing to determine whether the retroactive application of amended Bankruptcy Rule 7004 was just or practicable in this case.

B. Procedural History

The Petitioners, former officers and directors of Gulf USA Corporation ("Gulf"), a Delaware corporation that was headquartered in Boston throughout the Petitioners' tenure, are citizens and/or residents of the United Kingdom with few, if any, relevant contacts with Idaho. Several years after Petitioners left Gulf, involuntary bankruptcy proceedings against Gulf and a subsidiary, Pintlar Corporation ("Pintlar"), were commenced in the Idaho Bankruptcy Court. It is undisputed that Gulf met its financial obligations throughout the Petitioners' tenure as officers and directors.

Gulf then commenced an adversary proceeding in the Idaho Bankruptcy Court against the former management of Gulf, including the Petitioners, and others who allegedly acted in concert with them to recover damages from supposed waste or diversion of Gulf's assets.[2] Respondents alleged that the Petitioners controlled Gulf during their tenure as officers and directors, but it is undisputed that pursuant to the "Standstill

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[2] An amended complaint named Gulf, Pintlar and H.P. Harbert, as trustee of a litigation trust for the benefit of Gulf and Pintlar's creditors, as plaintiffs; and on January 25, 1996, Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as trustees of the litigation trust, replaced Gulf, Pintlar and Harbert as plaintiffs. Goodson, Elsaesser, Finley and Miller will hereinafter be referred to as Respondents (A 62a-65a).

Agreement" at least half of Gulf's directors were required at all times to be independent directors unrelated to the Petitioners. Thus, the Petitioners on their own could not have directed Gulf to engage in the transactions of which Respondents complain.[3] And, Respondents have presented no proof to date that any of the transactions in question were improper.

On or about January 31, 1995, the Petitioners and other defendants moved to dismiss for lack of personal jurisdiction and insufficient process and service of process. The motion was heard on June 30, 1995. The Bankruptcy Court dismissed the claims against the Petitioners for corporate waste and mismanagement. The Bankruptcy Court concluded, however, that Respondents had stated sufficient facts in the complaint which, if proven, would subject the Petitioners to jurisdiction in Idaho for Respondents' remaining claims under the Idaho long-arm statute and under the conspiracy theory of personal jurisdiction (A 79a-168a).[4]

On or about December 11, 1995, the Petitioners were granted leave to appeal, and Respondents were granted leave to cross-appeal, to the Idaho District Court (A 66a-68a). The District Court held that there was no jurisdiction over

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[3] The Petitioners could not approve related party transactions without the approval of two-thirds of the board of directors. Indeed, the transactions at issue in this proceeding were unanimously approved by Gulf's board of directors, including the independent directors.

[4] Although Gulf met its financial obligations throughout the Petitioners' tenure as officers and directors, Respondents nonetheless claimed that jurisdiction in Idaho was proper over the Petitioners because Rowland, acting solely in his capacity as Gulf's chairman, misrepresented to creditors in Idaho the directors' intention to meet Gulf's financial obligations. Respondents also claimed that Petitioners controlled Gulf despite the fact that at least half of the members of Gulf's board of directors were independent directors unrelated to the Petitioners. These erroneous allegations by Respondents were relied on by the courts below in finding that Respondents had stated sufficient facts, which if proven, would subject the Petitioners to jurisdiction in Idaho.

Petitioners for claims of breach of contract. The District Court also held, on grounds different than those relied upon by the Bankruptcy Court, that the Respondents had stated facts which, if proven, would subject Petitioners to jurisdiction in Idaho under the Idaho long-arm statute for all of Respondents' other claims (including corporate waste and mismanagement) (A 34a-57a). The interlocutory appeal was considered on submission only.

Both the Bankruptcy Court and the District Court agreed that jurisdiction over the Petitioners could be based only on the Idaho long-arm statute, and that no federal statute or rule, including the version of Rule 4 of the Federal Rules of Civil Procedure incorporated by the Bankruptcy Rules in effect at the time, subjected the Petitioners to jurisdiction. At the time of the decisions below, Bankruptcy Rule 7004 incorporated the version of Rule 4 in effect on January 1, 1990, notwithstanding any subsequent amendments to Rule 4 (A 172a).

By application dated September 25, 1996, the Petitioners sought, and on October 11, 1996 were granted, leave to appeal to the Ninth Circuit Court of Appeals from the District Court's decision of the jurisdictional motion (A 27a-28a). Oral argument of the Petitioners' appeal was heard by the Court of Appeals. The Court of Appeals' opinion was filed on November 3, 1997 (A 15a-26a) and, after rehearing, amended on January 14, 1998 (A 1a-14a).

On December 1, 1996, after the Court of Appeals granted Petitioners leave to appeal, amendments to Bankruptcy Rule 7004 became effective (A 181a). Amended Bankruptcy Rule 7004 deleted the old Bankruptcy Rule's incorporation of the version of Rule 4 that was in effect on January 1, 1990, and instead incorporated the current version of Rule 4 of the Federal Rules of Civil Procedure. The amendments to Bankruptcy Rule 7004 became effective nearly two years after the Petitioners' motion to dismiss, nearly three years after the commencement of this litigation, long after the purported

jurisdictional events and after the applicable statutes of limitations had expired for all of the claims for relief against Petitioners. The Ninth Circuit Court of Appeals affirmed the lower courts' denials of Petitioners' motion to dismiss for lack of personal jurisdiction by retroactively applying Bankruptcy Rule 7004(f), ignoring the lower courts' reliance upon the Idaho long-arm statute as the basis for personal jurisdiction.

C. Factual Background

Gulf is a Delaware corporation (A 85a). Petitioners were directors and/or officers of Gulf between 1989 and 1991 (A 84a). Prior to Petitioners' tenure as officers and directors of Gulf, Gulf conducted a number of businesses through subsidiaries. Gulf's former subsidiary, Bunker Hill Company ("Bunker Hill"), was involved in mining and smelting activities in Idaho, which activities ceased many years before 1989 (A 85a). In 1989, Downshire, N.V., a Netherlands Antilles company and subsidiary of Inoco, an English company, acquired 34% of Gulf's stock (A 86a). Petitioners, who were officers and/or directors of Inoco, were elected officers and/or directors of Gulf. When Petitioners became officers and/or directors of Gulf in 1989, the company's primary businesses consisted of oil and gas operations in Texas and Louisiana and coal operations in Pennsylvania.

In 1991, Downshire sold its Gulf stock to Nycal Corporation pursuant to a Stock Purchase Agreement (the "SPA") and Petitioners were replaced as officers and directors of Gulf (A 99a). The SPA was negotiated in the United Kingdom and called for a United Kingdom closing. After the closing, litigation arose in the United Kingdom out of the sale. The litigation was settled pursuant to three primary agreements, all dated October 4, 1991: (1) an agreement between Nycal, Inoco and Downshire; (2) an agreement between Inoco and Gulf; and (3) an agreement between City Realties Limited (Gulf's New Zealand subsidiary) and Inoco. Pursuant to these

agreements, Nycal, Gulf and City Realties released Inoco and the Petitioners from all claims which any of the corporations had against Inoco or the Petitioners (A 100a). The releases given by Gulf and its subsidiary were negotiated in England and are expressly governed by English law.[5]

Gulf was headquartered in Boston, Massachusetts throughout the Petitioners' tenure (A 85a). The succeeding management relocated Gulf's headquarters to Washington, D.C. (A 85a). Gulf's headquarters moved to Kellogg, Idaho sometime *after* the commencement of this action (A 85a). Gulf was not qualified to do business in Idaho when the Petitioners served as officers and directors of Gulf.

In 1992, after Petitioners ceased to be officers and directors of Gulf, Pintlar reacquired some of Bunker Hill's assets as a consequence of the bankruptcy of Bunker Hill Limited Partnership (A 85a-86a). The Bunker Hill site had become the subject of an environmental cleanup action in the early 1980's, prior to its reacquisition by Pintlar; alleged environmental liabilities were significant (A 86a). Thereafter, on October 18, 1993, an involuntary bankruptcy petition was filed against Pintlar in the Bankruptcy Court. An involuntary bankruptcy petition was filed against Gulf in the same court minutes after the petition was filed against Pintlar (A 39a). Significantly, Idaho venue for the Gulf case was premised not on Gulf's presence in Idaho, but, in part, on the pendency of the bankruptcy case against Pintlar in Idaho. Gulf initially contested the propriety of venue in Idaho and filed a voluntary bankruptcy petition in Delaware. Ultimately, Gulf consented to bankruptcy relief in Idaho pursuant to stipulations negotiated with the petitioning creditors.

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[5] The validity of the releases has been upheld by the United States District Court for the Southern District of New York. *See Nycal Corp. v. Inoco, Plc*, No. 96 Civ. 7159, 1997 U.S. Dist. LEXIS 19851 (S.D.N.Y. Dec. 15, 1997). The validity of the releases is also the subject of an action brought by the Petitioners and others against Gulf and others in England, which action has been stayed by the U.K. court.

The underlying adversary proceeding was commenced on January 27, 1994. Venue was based, not on the location of the defendants or the transactions at issue, but on the pendency of the bankruptcy proceeding against Gulf. An Amended Complaint asserting claims against the Petitioners and 28 other defendants was filed on November 30, 1994. The Amended Complaint contains a laundry list of charges against the former management of Gulf and others who allegedly acted in concert with them to recover damages for supposed waste or diversion of the company's assets. The claims against Gulf's former officers and directors, including the Petitioners, include theories of fraud, misrepresentation, breach of contract, breach of fiduciary duty, fraudulent conveyance, negligence and corporate waste. Respondents also claim that the releases given to the Petitioners by Gulf are void.

The damages attributed to the Petitioners in the Amended Complaint allegedly arose from several investments and commercial transactions which the Petitioners directed Gulf[6] or its subsidiaries (other than Pintlar) to engage in. Respondents have yet to provide a shred of evidence that any of these transactions was in any way improper. Many of these commercial transactions occurred overseas; none occurred in Idaho or involved Idaho residents or entities. These transactions include:

- the allegedly wasteful leasing of office space, equipment or motor vehicles in London or Monaco (A 89a);
- the purchase by Gulf of shares of stock of Storehouse Plc, a British retailer, over the London Stock

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[6] The transactions at issue were unanimously approved by Gulf's board of directors, including the independent directors who composed at least half of the board. The Petitioners on their own could not have directed Gulf to engage in the transactions of which Respondents complain as any related party transactions required the approval of two-thirds of the board of directors.

Exchange at an allegedly inflated price on August 29, 1989 (A 88a-89a);

- the purchase of various New Zealand properties by Gulf and one of its New Zealand subsidiaries (De Valdor) between September 1989 and early 1990 pursuant to which some defendants allegedly obtained improper fees (A 91a-93a);
- the allegedly improper merger of Gulf's New Zealand subsidiary (De Valdor) with a New Zealand company (City Realties Limited) in New Zealand between December 1989 and March 1990 (A 93a-94a);
- Gulf's allegedly improvident purchase in the U.K. of shares in a Texas corporation (Aviva Petroleum) traded on the International Stock Exchange (A 96a-97a);
- the purchase of property located in Kidderminster, England by an English subsidiary (Neldran Ltd.) of Gulf's New Zealand subsidiary (City Realties Limited) at an allegedly inflated price from a Panamanian company (A 97a-98a);
- the allegedly manipulative securities transactions made by Sexton Ltd., a British Virgin Islands subsidiary of Gulf, through an Anglo-Danish brokerage house (A 88a);
- the allegedly negligent investment by an English subsidiary (Lawgra (No. 76) Ltd.) of Gulf in the recovery of cargo from a sunken ship in the Gulf of Oman (A 98a); and
- the allegedly negligent real estate transactions by Gulf in Houston and New York City (A 89a, 94a-95a).

All of these transactions took place during 1989-1991. As the longest applicable statute of limitations for any of the claims

for relief asserted in the Amended Complaint is five years, it is clear that by December 1, 1996, the date that the amended bankruptcy rules took effect, each of the claims for relief would have been barred by the relevant statute of limitations.[7]

At all relevant times, Rowland, James and Hudd were citizens of the U.K. and Moran was a citizen of Canada. At all relevant times, James, Hudd and Moran were residents of the U.K., and Rowland was a resident of Monaco (A 36a). The Petitioners own no property, and conduct no substantial or continuing activities, in Idaho or the U.S. (A 115a). Throughout their tenure at Gulf, the Petitioners continued to reside abroad. None of the Petitioners has ever been a resident or citizen of Idaho or the U.S. Although the Petitioners infrequently traveled to the U.S. for meetings of Gulf's board of directors or stockholders, none of these meetings was ever held in Idaho while they were with the company.[8] The Petitioners had little, if any, contact with Idaho, and those few contacts with Idaho were extremely sporadic: Moran was

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[7] Count I is governed by 11 U.S.C. § 546(a) (earlier of (1) the later of (a) two years after order for relief or (b) one year after appointment of the first trustee and (2) the time the case is closed or dismissed). Count II, for breach of fiduciary duties, corporate waste and mismanagement is governed by I.C. § 5-217 and I.C. § 5-224 and has a statute of limitations of four years. Count III, for misrepresentation is governed by I.C. § 5-218(4) and has a statute of limitations of three years. There is no statute, nor any case law, creating a separate cause of action, let alone a statute of limitations for Counts IV and V, seeking damages for aiding and abetting and civil conspiracy. Count VI, breach of the Standstill Agreement, is governed by I.C. § 5-216 and has a statute of limitations of five years. Count VII, seeking damages for violation of Delaware General Corporation Law Section 160 has a statute of limitations of three years. Count VIII seeks to toll all statute of limitations due to fraud which is governed by a statute of limitations of three years. Count IX seeks to avoid the releases on account of fraud and is likely governed by I.C. §5-218(4) and has a statute of limitations of three years.

[8] The primary board meeting about which Respondents complain did not even occur in the United States but in Cap Ferat, France.

never present in Idaho (A 121a); James was in Idaho only once to discuss environmental issues (A 121a); Hudd was in Idaho only a few times to discuss environmental issues; and jurisdiction over Rowland is premised solely on a letter he signed addressed to certain creditors of Gulf (A 118a). The Petitioners never met directly with any creditors in Idaho.

In lieu of an answer, the Petitioners moved to dismiss the amended complaint for lack of personal jurisdiction and insufficient process and service of process. The decisions below were based solely on affidavits and pleadings, and, as is appropriate in considering a motion to dismiss the complaint, the courts below viewed the disputed allegations in a light most favorable to Respondents. Petitioners were not subject to general jurisdiction since they did not conduct substantial or ongoing activities in Idaho. The Bankruptcy Court first examined whether the assertion of personal jurisdiction over the Petitioners was valid under the Idaho long-arm statute, I.C. § 5-514(b) (commission of a tort within the State of Idaho). The Bankruptcy Court concluded that the claims against the Petitioners for corporate waste and mismanagement did not involve Idaho activities or injury and that the Petitioners were not amenable to service on these claims. The Bankruptcy Court found, however, that Respondents had sufficiently stated that Rowland and Hudd had each made a misrepresentation directed at creditors in Idaho because creditors were induced not to take steps to stop Rowland's and Hudd's activities, and that Rowland and Hudd were therefore subject to jurisdiction under the Idaho long-arm statute for all claims other than corporate waste and mismanagement (A 118a-121a).

In finding that sufficient facts had been pleaded to find Rowland subject to jurisdiction under the long-arm statute, the Bankruptcy Court relied entirely on a brief letter dated September 17, 1990 signed by Rowland, in his capacity as President of Gulf, to retirees of Gulf's former subsidiary Bunker Hill (A 118a). The letter merely explains Gulf's

general purpose in making various investments in the U.S. and abroad and Gulf's goal to meet its obligations to the retirees.[9] Respondents contend that the investments were really a sinister attempt to divert Gulf's assets and that the letter must therefore be considered false. The Bankruptcy Court, for purposes of the motion, treated the allegation that the letter contained a false statement as if it was true.

In finding that sufficient facts had been pleaded to find Hudd subject to jurisdiction under the long-arm statute, the Bankruptcy Court relied solely on a conference purportedly attended by Hudd on February 5, 1991 in Idaho during which he allegedly assured the Governor of Idaho that the commercial transactions were not intended to avoid or defraud Gulf's creditors (A 118a). Hudd specifically denied attending any such conference. The allegation that Hudd attended the conference was contained only in an affidavit of H.P. Harbert, former president of Pintlar. Shortly after the Bankruptcy Court decision, Harbert admitted that Hudd had not attended the conference and recanted his allegation that Hudd had been in Idaho at the time of the meeting (A 38a-39a n.6).

The Bankruptcy Court found that James and Moran had no direct jurisdictional contact with Idaho. The Bankruptcy Court nevertheless concluded that the Idaho Supreme Court would adopt the conspiracy theory of jurisdiction when construing the Idaho long-arm statute (A 121a-122a).[10]

The Bankruptcy Court held that isolated alleged misrepresentations by Rowland and Hudd subjected all of the Petitioners to jurisdiction under the Idaho long-arm statute not just for misrepresentation, but for all of Respondents' claims other than corporate waste and mismanagement (A 118a-

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[9] The letter was prepared by, and at the suggestion of, Gulf's outside counsel and was approved by Gulf's general counsel. Importantly the letter was written *after* many of the transactions identified above.

[10] Each of the Petitioners has explicitly and emphatically denied participating in any conspiracy.

122a). The Bankruptcy Court ignored Petitioners' argument that the Respondents lack standing or subject matter jurisdiction to bring the misrepresentation claim, thus destroying the only jurisdictional nexus with Idaho.

The Bankruptcy Court then considered whether the assertion of jurisdiction over the Petitioners comported with due process. The Bankruptcy Court looked to the Petitioners' contacts with the United States as a whole, rather than to their contacts with the forum state of Idaho (A 134a). It found sufficient national contacts largely on the strength of evidence that Respondents had participated in board of directors' meetings in states other than Idaho (A 138a).

The District Court held that the assertion of jurisdiction is proper under the Idaho long-arm statute whenever due process is satisfied (A 41a). The District Court did not separately examine whether the assertion of jurisdiction was proper under the Idaho long-arm statute. In conducting the due process analysis, the District Court correctly rejected the national contacts analysis applied by the Bankruptcy Court and held that Idaho was the relevant forum (A 44a-48a). The District Court then turned to the first prong of the due process test: whether the Petitioners had purposefully availed themselves of the forum of Idaho. The District Court found that the Petitioners' alleged contacts with Idaho were unrelated to the breach of contract claim (which was based on a purported violation of the Standstill Agreement between Gulf, Inoco, Downshire and the Petitioners), and it dismissed that claim (A 48a-52a).

The District Court found that Rowland had purposefully availed himself of the forum of Idaho based on the September 17, 1990 letter and that the alleged misrepresentation in the letter subjected Rowland to personal jurisdiction in Idaho for all of Respondents' other claims (A 49a). The District Court acknowledged Harbert's recantation of his claim that Hudd and the Governor of Idaho met in Idaho, which formed the

basis of the Bankruptcy Court's assertion of personal jurisdiction over Hudd (A 38a-39a n.6). Despite the fact that Harbert's veracity had been seriously called into question, the District Court nonetheless credited additional allegations made by him that Hudd had made misrepresentations at a few other meetings, all of which related to environmental issues, with Harbert in Idaho.[11] The District Court held that this was sufficient to find that Hudd had availed himself of Idaho for all of Respondents' claims except breach of contract (A 50a-51a).

The District Court rejected, as a matter of law, the Bankruptcy Court's determination that James had no relevant contacts with Idaho. Instead, the District Court credited Harbert's allegation that James attended a single meeting with Harbert in Idaho on February 21, 1991 relating to environmental issues at which James allegedly made a false statement concerning Gulf's commitment to address environmental issues. James denied making the purported misrepresentation, but the District Court found the allegation sufficient, for purposes of this motion, to assert personal jurisdiction over James in Idaho for all of Respondents' claims except breach of contract (A 51a).

The District Court, like the Bankruptcy Court, held that Moran had no relevant contacts with Idaho. The District Court premised jurisdiction over Moran on a theory that he allegedly conspired with the other Petitioners to defraud creditors in Idaho. The "evidence" of conspiracy essentially was the allegation in the Amended Complaint that Moran voted as a director block with the other Petitioners at Gulf on the commercial transactions and the unsupported allegation that Moran benefitted from those transactions (A 51a-52a). While acknowledging that the misrepresentation claim was the sole connection between any of the Petitioners and Idaho, the District Court specifically refused to consider whether the

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[11] Hudd denied making any misrepresentations whatsoever.

Respondents had subject matter jurisdiction to bring that claim.[12] If the Respondents lacked standing to assert the misrepresentation claim, the jurisdictional nexus between the Petitioners and Idaho would evaporate.

The District Court then turned to the second prong of the due process test: whether, "but for" the contacts with Idaho, the cause of action would not have arisen. The District Court, with little analysis, found this prong of the test was met with respect to all of the claims against the Petitioners despite the fact that their purported Idaho contacts were limited to alleged misrepresentations (A 52a-53a). The District Court acknowledged that the alleged misrepresentations occurred *after* many of the transactions at issue in the Amended Complaint (A 53a) and presumably could not have impacted the transactions about which Respondents complain. The District Court, however, relied on those contacts when asserting jurisdiction over the Petitioners for the transactions.

The District Court found the assertion of personal jurisdiction over the Petitioners to be reasonable despite the facts that the Petitioners are foreign citizens and residents who had few if any contacts with Idaho and that the transactions complained of did not occur in Idaho (or, in many cases, in the U.S.) or involve Idaho entities or residents (A 53a-56a). Finally, the District Court held, without analysis, that service of process on foreign defendants in an adversary proceeding may be accomplished pursuant to Bankruptcy Rule 7004(a) as well as Bankruptcy Rule 7004(e) (A 56a).

By order dated October 11, 1996, the Ninth Circuit Court of Appeals granted the Petitioners leave to appeal from the

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[12] The District Court believed the subject matter jurisdiction issue was unrelated to personal jurisdiction and thus declined to decide it (A 56a n.16). The misrepresentation claim is the only connection between the Petitioners and Idaho. If Respondents cannot assert a misrepresentation claim, there is no jurisdictional nexus with Idaho and the assertion of personal jurisdiction over the Petitioners in Idaho is improper.

District Court's opinion and order (A 27a-28a). No doubt recognizing that personal jurisdiction over the Petitioners was simply not tenable under the law applied below, the Court of Appeals did not address the Idaho long-arm statute and due process issues that were addressed by the courts below. Instead, the Ninth Circuit found that the Petitioners were subject to jurisdiction in Idaho under Federal Rule of Civil Procedure 4(k)(2), made applicable to the proceeding by recent amendments to Rule 7004 of the Federal Rules of Bankruptcy Procedure (A 8a-14a).

The Court of Appeals found that the December 1, 1996 amendments to Bankruptcy Rule 7004 were applicable to this proceeding. In making this finding, the Ninth Circuit held that amended Bankruptcy Rule 7004 could be applied retroactively without undue prejudice to the Petitioners, in part, because the Petitioners did not offer factual evidence that they would have behaved differently if they had expected amended Bankruptcy Rule 7004(f) to apply (A 11a). This holding overlooks the fact that amended Bankruptcy Rule 7004 did not exist at the time factual evidence was submitted to the Bankruptcy Court, so the Petitioners never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on the Petitioners' conduct.

Until December 1, 1996, the date that the amendments to Bankruptcy Rule 7004 took effect (A 181a), there was no basis for the courts to assert personal jurisdiction over Petitioners. And, as set forth above, the statutes of limitations applicable to the underlying causes of action had run by that date. Thus, the Ninth Circuit's retroactive application of the amendments to Bankruptcy Rule 7004 to the underlying adversary proceeding extends the statutes of limitations, a result that contravenes its own precedent and that of this Court.

REASONS FOR GRANTING THIS PETITION

This appears to be the first and only Court of Appeals decision to date to address the question of whether amended Bankruptcy Rule 7004 should be applied retroactively to a pending adversary proceeding and thus is properly before this Court for review. By mechanically applying *dictum* from this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Ninth Circuit has brought to life claims for relief against the Petitioners that never should have been brought in Idaho in the first place and which would have long ago been dismissed had the lower courts properly applied the law as it existed at the time those decisions were made. Such a result is neither just nor practicable and should not be allowed to stand.

I. The Ninth Circuit Erred By Retroactively Applying The Recent Amendments To The Bankruptcy Rules To The Underlying Adversary Proceeding

In its order adopting the 1996 amendments to the Bankruptcy Rules, this Court stated that the amendments would apply to cases pending on December 1, 1996 only where it was "just and practicable" to do so. 1996 U.S. Order 96-14 (Order of the Supreme Court of the United States Adopting and Amending Rules, Apr. 23, 1996) (A 181a). To apply the new rule in these circumstances is neither just nor practicable. On December 1, 1996, the statutes of limitations applicable to the underlying causes of action had run. The application of the new Rule to this case would alter the rights of the Petitioners by providing a basis for jurisdiction that did not exist at the time of the events underlying this action, at the time the action was commenced, or at the time the motion to dismiss was made. It would also revive causes of action that would otherwise be barred by the applicable statutes of limitations.

In making this decision, the Ninth Circuit ignored its own precedent, which recognized that even where a statute is procedural in nature, it may be unjust to apply the statute retroactively. *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994). In *Chenault*, the Ninth Circuit refused to apply a new limitations period to actions taken prior to the enactment of the new statute, as such application would revive a claim that otherwise could not have been brought. *Id.*[13] Application of the new Rule would subject Petitioners to a claim in Idaho to which they otherwise would not be subject. The new Rule would thus prejudice the rights of the Petitioners as well as increase their liability.

Whether a defendant reasonably anticipated being haled into court in a particular forum is at the heart of the jurisdictional inquiry here. At the time of the events in question, the Petitioners could not have anticipated being haled into court in Idaho.[14] Under the Rule in effect until December 1, 1996, the Petitioners' contacts with Idaho were insufficient to justify personal jurisdiction. This was implicitly recognized by the Ninth Circuit which refused even to address the application of the Idaho long-arm statute to Petitioners below. New Rule 7004(f) completely alters the jurisdictional test, allowing a defendant's aggregate national contacts to provide a

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[13] *Landgraf*, 511 U.S. at 291 (1994) (Scalia, J., concurring) ("Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered") (emphasis added).

[14] Limits upon the assertion of personal jurisdiction which are based on defendants' reliance interest are well-established in our constitutional jurisprudence. And, in evaluating whether the exercise of long-arm jurisdiction comports with due process, this Court has emphasized the unfairness of requiring a party to litigate in an unanticipated forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (whether a defendant "should reasonably anticipate being haled into court" in the forum state is a crucial consideration, and due process "allows potential defendants . . . some minimum assurance as to where [their] conduct will and will not render them liable to suit").

basis for jurisdiction. The Bankruptcy Rule in place at the time of the activities underlying this action should therefore be applied. *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1424 n.2 (D. Nev. 1994) ("personal jurisdiction should be assessed according to the long arm statute in effect at the time the claim arose. Because jurisdiction is limited to claims arising out of forum-related activities, due process requires that the defendant have fair notice that such activities may expose it to local jurisdiction").

In rendering its decision, the Ninth Circuit stated that "Defendants' argument that they could not reasonably have expected being haled into court in Idaho is unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors" (A 11a). But, as set forth in greater detail above, Petitioners' "conduct" could not lead to jurisdiction under the Idaho long-arm statute. The Petitioners' contacts with Idaho are simply too limited to constitute purposeful availment of the forum. Indeed, Moran had no contacts with Idaho whatsoever (A 51a, 121a).

And, since amended Bankruptcy Rule 7004(f) was not even in existence at the time the motion to dismiss was submitted to the Bankruptcy Court, the Petitioners did not and could not submit any factual evidence to show how they would have behaved differently had they expected the amended Rule to apply. It was not possible for the Petitioners to have submitted evidence regarding the effects of amended Bankruptcy Rule 7004(f) because that Rule did not exist. At the very least, this case ought to be remanded to afford Petitioners the opportunity to present evidence of how their conduct would have been different if they had known that these amendments would apply. In all events, however, whether Petitioners would have changed their conduct if they had known the amendments would apply is not determinative. *Chenault*, 37 F.3d at 539 (focus on prejudice to defendant, not whether defendant would have altered its conduct).

The Ninth Circuit's reliance on this Court's decision in *Landgraf* is misplaced. There, this Court decided whether a non-jurisdictional remedial statute that created an additional remedy for sexual harassment claims should apply retroactively where there was *no indication* of whether the statute was intended to apply to cases that were pending when it became effective. *Landgraf*, 511 U.S. at 280.[15] In contrast, the enabling order in the present case provides that the revised rules apply to pending cases only where "just and practicable" (A 181a). The Court made clear that, in deciding retroactivity, the first consideration is the expressed intent, if any, of the legislature, because if there is an express prescription, "there is no need to resort to judicial default rules" for deciding retroactivity. *Landgraf*, 511 U.S. at 280. In *Landgraf*, there was no such prescription, so the court relied upon a "deeply rooted" presumption against retroactivity. *Id.* at 265.

In *dictum*, the Court also observed that, in the absence of express prescriptions, statutes affecting jurisdiction "regularly" have been applied retroactively (*id.* at 274), cautioning, however, that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," that the Court favored "the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case," and that "concerns about retroactivity" apply "to procedural rules." *Id.* at 275 n.29. The Court gave examples of prior cases in which the potential retroactivity of jurisdictional changes had been considered. *Id.* at 274. All but one of those cases involved changes in a court's subject-matter jurisdiction. The sole exception involved a change in

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[15] In *Landgraf*, this Court clarified that "prospectivity remains the appropriate default rule" and that *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), which states that a court should apply the law in effect at the time of the decision, "did not alter [this] well-settled presumption." *Landgraf*, 511 U.S. at 272, 277. The Court distinguished cases such as *Bradley* which consider statutes involving issues that are separable from the cause of action and that do not impose an additional or unforeseeable obligation upon the defendant.

rules relating to the location of the *res* for purposes of *in rem* jurisdiction; in that case the Court declined to apply the change retroactively. None of the cases involved a change in rules governing *in personam* jurisdiction.

Moreover, in the present case, unlike in *Landgraf*, there *is* an express prescription regarding retroactivity in the Supreme Court order that amended Rule 7004. Consistent with the "common-sense" approach referred to in *Landgraf*, the Supreme Court order expressly provides that the amendment should apply retroactively only "insofar as just and practicable" (A 181a). Retroactive application of amended Rule 7004 to this case would contravene this prescription, because it would not be "just" in "the posture of the particular case" (*Landgraf*, 511 U.S. at 275 n.29). Up until December 1, 1996 (the date the amended bankruptcy rules took effect), there was no legally proper basis for the assertion of personal jurisdiction over the Petitioners and the statutes of limitations applicable to the underlying causes of action had run. It would not be "just" to use a jurisdictional amendment to extend the statutes of limitations on causes of action which should have been dismissed long ago. The applicable considerations are no different from the ones that led the Ninth Circuit to conclude that legislation extending a statute of limitation should not apply retroactively because the defendant "would be forced to defend an action that was previously time-barred." *Chenault*, 37 F.3d at 539.

McGee v. International Life Ins. Co., 355 U.S. 220 (1957), relied upon by the Ninth Circuit is distinguishable because it did not require retroactive application of the statute. In that case, this Court examined whether applying an amended statute to a contract entered into prior to the amendment would unconstitutionally impair the contract. *McGee*, 355 U.S. at 224. The case was decided under the Contracts Clause of the Constitution, and the Court held that the statute "neither enlarged nor impaired respondent's substantive rights or obligations under the contract." *Id.* Unlike the present case,

McGee was based on a contract with substantial connection to the forum. *Id.* at 223.

Another case relied upon by the Ninth Circuit, *Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.)*, 42 F.3d 1306 (9th Cir. 1994) is also distinguishable from the case at bar. The *Arrowhead* court considered the retroactive application of an amendment to Bankruptcy Rule 8002(a) that provided that a notice of appeal filed after the announcement of an order but prior to its entry would be valid.[16] *Arrowhead* addresses a technical amendment to the rules governing the manner in which an appeal can be taken. That rule merely eliminated a "trap" invalidating otherwise valid appeals based on a formalistic timing requirement. *Arrowhead*, 42 F.3d at 1310. In contrast, new Rule 7004(f) provides personal jurisdiction where jurisdiction was lacking prior to the enactment of the statute. Retroactive application of this rule thus implicates constitutional and fairness concerns about prejudice to a defendant's rights not present in *Arrowhead*.

The retroactive application of revised Rule 7004(f) to this matter by the Ninth Circuit prejudices the rights of the Petitioners and is neither just nor practicable. Accordingly, the Rule in force prior to December 1, 1996 that was applied by the lower courts should be applied here and the case should be dismissed.

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[16] Prior to *Arrowhead*, a notice to appeal filed before entry of an order had no effect. *Arrowhead*, 42 F.3d at 1309-10.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

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